

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

v.

Robert C. Osborne - 001
Debra Osborne - 002,

Defendants.

No. CR-14-02058-001-TUC-RCC (DTF)

ORDER

This Court has considered the Franks Hearing and the evidence taken therein, as well as the memorandum filed by counsel in this matter. The evidence, to put it mildly, is somewhat voluminous.

In a nutshell, the Defendant, Dr. Osborne, seeks to suppress evidence seized as a result of the serving of a search warrant for his medical practice and his home in May 2013. The Defendant had a pain management practice for quite some time. Dr. Osborne had been an anesthesiologist for most of his career, and for all practical purposes, the patients seen by him were there because of pain or claims of pain. One of his primary methods of treating patients' pain was with prescription medication. This medication was often very strong and sometimes had addictive side effects. Pharmacists and data bases lead the authorities to Dr. Osborne. Authorities believed that the prescription medication provided by Dr. Osborne caused or contributed to the death of a number of patients in the Pima County area because of this information.

The search warrant was served in May 2013, but the case began way before then,

1 back in 2004. On at least two occasions, the case was presented to the US Attorney's
2 Office for prosecution and was declined. Both occasions occurred in 2008.

3 After the case was declined, the prosecution's investigator, David Wickey,
4 continued his investigation. The instant case was primarily brought as a result of
5 Wickey's investigation. Yet, Mr. Wickey was a DEA diversion investigator with no
6 arrest powers. He was, for all practical purposes, the lead investigator throughout the
7 almost ten years that this case proceeded and much of the case was based on the
8 information he provided and gathered from certain sources, including various
9 pharmacists and insurance databases that dealt with the dispensing of narcotic drugs.
10 Moreover, as a witness Mr. Wickey had various issues that led to disciplinary actions
11 from his employers. The substance of these actions will not be discussed here, but in the
12 eyes of the Court they were of a nature that puts his testimony in a rather poor light.

13 When putting the affidavit in its best light, it is filled with a number of inaccurate
14 statements that paint a dim picture of Dr. Osborne. The information within it concerns
15 Dr. Osborne's medical practice, his treatment of patients, and his prescribing of drugs for
16 their medical care. The affidavit:

- 17 1. Begins by touting Agent Gonzales as a medical expert because of her nursing
18 experience and leads one to believe that because of that expertise, the medical
19 components discussed in the affidavit should be given significant weight since they
20 were coming from a former medical practitioner;
- 21 2. Puts great emphasis on the fact that Dr. Osborne did not take insurance and that his
22 practice was primarily on a cash basis;
- 23 3. Emphasizes the statements of an informant; and
- 24 4. Speculates that Dr. Osborne was responsible for the death of up to twenty-seven
25 patients.

26 For a search warrant to lawfully issue, the Supreme Court requires that a
27 finding of probable cause be based on an honest recitation of facts. It has stated:
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1 [W]hen the Fourth Amendment demands a factual showing sufficient to
2 comprise “probable cause,” the obvious assumption is that there will be a
3 truthful showing. This does not mean “truthful” in the sense that every fact
4 recited in the warrant affidavit is necessarily correct, for probable cause
5 may be founded upon hearsay and upon information received from
6 informants, as well as upon information within the affiant's own knowledge
7 that sometimes must be garnered hastily. But surely it is to be “truthful” in
8 the sense that the information put forth is believed or *appropriately*
9 *accepted by the affiant as true*. It is established law, that a warrant affidavit
10 must set forth particular facts and circumstances underlying the existence of
11 probable cause, so as to allow the magistrate to make an independent
12 evaluation of the matter.

13 *Franks v. Delaware*, 438 U.S. 154, 164–65 (1978) (internal citation and quotation marks
14 omitted) (emphasis added).

15 The affidavit for the search warrant was signed by Agent Shannon Gonzales.
16 When testimony was rendered in court, it clearly revealed that Agent Gonzales was only
17 on the case for approximately sixty days prior to the service of the search warrant, and
18 that she had little if anything to do with the gathering of the evidence talked about in the
19 search warrant and did not prepare the affidavit herself. Gonzales certified the contents
20 of the affidavit, although she was not involved in the investigation and only came on
21 within the last two months of a case that had been under investigation for years.

22 The actual work on the warrant was done by Agent Middleton, based on
23 information provided to her primarily by David Wickey. Agent Middleton had been
24 transferred to a post on the East Coast a few months prior to the service of the warrant.
25 Why she was not brought back to swear out the warrant is a question this Court has no
26 answers to.

27 Agent Gonzales did little, if anything, to check the facts contained in the affidavit.
28 During the testimony, Agent Gonzales indicated that she relied primarily on what was
written by Agent Middleton since the affidavit was prepared primarily by Middleton
before Gonzales came on the scene. But Agent Middleton indicated that she expected
her prior affidavit to be fact checked by whoever did the signing of the affidavit, which
would have been Agent Gonzales. This finger pointing was somewhat unusual in a case

1 of this nature. In truth, both of the agents were relying on the information gathered by
2 David Wickey, and most of the misstatements and omissions could be attributed to the
3 work he did in this case.

4 In addition, the affidavit touts Agent Gonzales' medical pedigree. But Agent
5 Gonzales was not a medical expert, contrary to the picture painted in the affidavit.
6 Moreover, her testimony indicated little medical knowledge about the specific facts
7 involved in this case. Gonzales' medical knowledge was of no consequence at all in the
8 search warrant.

9 And the affidavit puts great emphasis on the fact that Dr. Osborne did not take
10 insurance and had a cash only practice. Yet, it was made clear in court testimony that it
11 is not an unusual practice for medical providers not to accept insurance. Furthermore, Dr.
12 Osborne did not just deal in cash, but would also take checks, money orders, et cetera;
13 some of his patients were even there by way of Medicare.

14 There was also the significant use of an informant in this case. However, the
15 affidavit fails to apprise the Court that the informant was given significant benefits in a
16 criminal case in which they were the subject, and that the informant was paid. Not
17 divulging this information to Judge Estrada was a grave error and puts almost all of the
18 information gleaned from the informant in doubt.

19 No matter who made the misleading or recklessly false statements, the affidavit
20 states what it states, and the Court must take those statement as they are. So, even if
21 Agent Gonzales did not personally know of the false statements and material admissions,
22 she signed the affidavit and is responsible for any false statements or material admissions
23 therein. They are attributed to her and other Government officials involved in this case.
24 The Court finds that the affidavit's failure to provide accurate information to the
25 Magistrate Judge is crucial. *See United States v. DeLeon*, 979 F.2d 761, 763 (9th Cir.
26 1992) ("Misstatements and omissions" that are material to a determination of probable
27 cause may result in exclusion of the evidence obtained).

28 The affidavit also tells the Magistrate Judge that twenty-seven of Dr. Osborne's
current or former patients died of a suspected or confirmed drug overdose. However, that

1 was incorrect. The best-case scenario was that only nine patients of Dr. Osborne may
 2 have died in this manner. Furthermore, a closer look at the nine patients indicates that
 3 some of those patients did not die from drugs prescribed by Dr. Osborne. So, to indicate
 4 that he was responsible for even those nine deaths is an exaggeration. The Court will not
 5 detail all of the misstatements about those nine deaths because significant time was spent
 6 in the hearing going over those cases as well as significant time in the Defendant's
 7 memorandum. In sum, several of the deaths of these patients cannot be attributed to Dr.
 8 Osborne, even giving the government the benefit of the doubt.

9 Maybe the biggest problem with the affidavit is that it is overbroad. The affidavit,
 10 while relying primarily on the death of nine patients of Dr. Osborne, pretty much asks for
 11 all of the records of his practice. An attachment to the affidavit asks for specifically 210
 12 patient files. Those names were gathered by David Wickey and were simply names of
 13 people he came across while researching prescriptions written by Dr. Osborne. There
 14 was no probable cause or information to indicate that anything Dr. Osborne had
 15 prescribed for those 210 patients was criminal in nature.

16 To put it mildly, while the affidavit was overbroad, the search reached even
 17 further. A search warrant must not reach beyond the grasp of probable cause. *United*
 18 *States v. Whitney*, 633 F.2d 902, 907 (9th Cir. 1980). When serving the search warrant,
 19 the Government pretty much seized everything in the Defendant's office and at home.

20 The Court finds the following deficiencies with the affidavit:

- 21 1. There was no probable cause to seize the 210 specific patients' files. At best the
 22 Government could point to nine files they could have had a legitimate interest in.
- 23 2. In the serving of the search warrant, even more than those 210 files were taken. A
 24 significant number of patient files were taken that could have gone back as far as
 25 2003 from Dr. Osborne's practice.
- 26 3. The affidavit was not tailored with the required specificity, and the actual search
 27 of Dr. Osborne's office led to an overly broad seizure of evidence; more than the
 28 Government could have ever anticipated being entitled to.

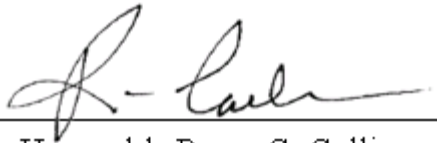
There are a number of other misstatements and missteps that were made by the

1 Government in this case. The Court will not delineate all of them here. Suffice it to say,
2 while Dr. Osborne may not be a saint, neither is the Government. Not being a saint for
3 Dr. Osborne is not fatal, but for the Government's case it is.

4 The Court GRANTS the Motion to Suppress. (Doc. 194.)

5 Dated this 30th day of June, 2020.

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Honorable Raner C. Collins
Senior United States District Judge